INVAR REALTY PTE. LTD.

v.

JDC CORP.

HIGH COURT SINGAPORE
CHAO HICK TIN JC
[ORIGINATING MOTION NO. 36 OF 1987]
11 MAY 1988

CONTRACT: *Arbitration - Finality - Leave to appeal against an award of an arbitrator - Leave to apply for an order that reasons be given by arbitrator - Section 28(3)(b) of the Arbitration Act.*

The applicant entered into a building contract with the respondent and under the said contract liquidated damages were payable if the respondent failed to complete the works by the date of completion. Due to some problems and remedial works which have to be carried out by the respondent, the architect in charge granted an extension of time for a total period of 10½ months.

There was a dispute as to whether the architect's decision for extension of time was wrong and whether the applicant was bound by it. The parties agreed to submit the dispute to arbitration. After hearing Counsels for both parties the arbitrator made an award to the effect that the extension of time of 10½ months was by mutual agreement of the parties.

Being dissatisfied with the award the applicant filed in two applications. One under s. 28(3)(b) of the Arbitration Act for leave to appeal and the other under s. 28(5)(b) for leave to apply for an order directing the arbitrator to give further reasons.

Held:

[1] The aim of the Arbitration Act is to promote finality in arbitration proceedings. Therefore unless it can be shown that the Arbitrator was obviously wrong in his decision, leave to appeal should not be granted.

[2] Where both parties did not give notice to the arbitrator, before the award was made, that a reasoned award would be required, no leave may be granted to apply for an order for reasons to be given by the arbitrator unless the Court is satisfied that there is some special reasons why such notice was not given to the arbitrator in the first place.

Cases referred to:
The Nema [1981] 2 LLR 239
Antaios Companies v. Salem [1985] 1 AC 191
Trave Schiffagrtsgesellschaft v. Ninemia Maritime [1986] 2 WLR 773
The Dynashinky [1986] 1 LLR 435
Wards v. Feedex International [1984] 1 LLR 310

Legislation referred to:
Arbitration Act 1985 (Cap 10) [Sing], ss. 28, (3)(b), (5)(b), (6)
Arbitration Act 1979 [UK], s. 1, (6)

Other source referred to:
Commercial Arbitration, Mustill & Boyd, 1982 Edn., p. 563

For the applicant - Richard Fernyhough Q.C. (assisted by Lim Chor Pee)
For the respondent - C.S. Wu (Tan Tee Jim with him)

JUDGMENT

Chao Hick Tin JC:

This is an application under s. 28(3)(b) of the Arbitration Act for leave to appeal to the High Court against the interim award of an arbitrator made on 25 April 1987.

The background to the case is as follows. The applicant (Invar) entered into a building contract with the respondent (JDC) on 20 May 1983 for the construction of a 18-storey building at Cecil Street, Singapore. The formal agreement was signed on 28 August 1983. The contract was a standard form contract. Liquidated damages were payable if the respondent should fail to complete the works by the date of completion or any extension granted in accordance with the contract.

The respondent commenced work in June 1983. On 3 September 1984, it was discovered (due to no fault of JDC) that the cantilever beams on certain floors had a deflection problem to such an extent that there would be insurmountable problems in the installation of the curtain wall. As a result, the architect ordered JDC to stop work. The stoppage lasted for 100 days. In December 1984, the architect instructed JDC to carry out certain remedial works. In response to the architect's request, JDC submitted on 7 January 1985 a revised master-programme for completing the project. There was a site-meeting on 9 January 1985 where this revised master-programme was discussed and agreed upon. The minutes of that site meeting recorded that "Invar and Consultants confirmed acceptance of JDC's revised master-programme." At the next site meeting a week later the minutes of the last meeting were confirmed and the following matter was also minuted:

> Invar and Consultant requested that should actual progress of vertical tiles be faster than as indicated in the master-programme, they would be required to revise the programme to enforce early start for curtain wall, M & E and finishing works and eventually completion date. JDC confirmed agreement.

On 31 January 1985, the architect wrote to JDC stating that by virtue of Clause 23 of the contract, an extension time was granted to JDC for a total period of 10½ months from 15 April 1985 (the original completion date), "which has been agreed on at the meeting held on 9 January 1985 between the owner, consultant and contractor."

Subsequently, on 24 August 1985, in view of the apparently greater speed with which JDC carried out the remedial works, the architect wrote to JDC which, *inter alia*, stated that the completion date for the project should be at the end of October 1985 and not at the end of February 1986. Thereafter letters followed between JDC and the architect culminating in a letter dated 27 January 1986 from the architect to Invar, the relevant part of which reads:

> We have monitored the construction sequence throughout the construction. Although during some stage of construction, less time was involved than first anticipated, modification to curtain wall brackets and other minor adjustments have caused necessary time consumption. These minor adjustments were anticipated and were incorporated in the study for extension of time to be granted. Monitoring the construction programme, JDC have generally carried out the work promptly throughout. Therefore, actual time required for construction and our recommendation to grant an extension of time until 28 February 86 is equally fair and adequate.

In their letter of 13 February 1986, Invar challenged the decision of the architect as conveyed in the architect's letter of 27 January 1986. The architect did not respond to Invar.

The project was duly completed on 28 February 1986, with the issue of a certificate of practical completion by the architect. However, because of the stand Invar had taken on the question of extension of time for completion, Invar refused to make payment in respect of Interim Certificate No. 30 (the sum of $941,379.37) or release part of the retention sum of $918,940.21 certified by the architect. It claimed to be entitled to deduct for liquidated damages from monies due to JDC for late completion, as completion should have been on 31 October 1985 (subsequently amended to 7 October 1985). Much later, Interim Certificate No. 31 for the sum of $3,132,092.45 was issued by the architect which Invar, for the same reason, refused to pay.

The parties agreed to submit the dispute to arbitration under Clause 34 of the contract. By consent, they appointed Mr Goh Joon Seng, advocate and solicitor, as arbitrator. I should like to observe that at the time of appointment, Mr. Goh, was an advocate and solicitor of considerable seniority. As I understand it, Mr. Goh was chosen by the parties because of his experience and knowledge in the field of building contracts.

In the amended points of claim, JDC claimed the following sums:

(a) Interim Certificate No 30-$941,379.37

(b) Release of part of retention sum certified by architect - $918,940.21

(c) Interim Certificate No. 31 - $3,132,092.45

(d) Loss & expense (arising out of the variation) - $5,448,413.90

and interest and costs. In the re-amended points of defence and counterclaim, Invar claimed the right to liquidated damages for late completion and the right to set-off against the payments due to JDC. Invar contended that the extension up to 28 February 1986 was made by the architect under Clause 23 and that Invar's acceptance of or agreement to the extension played no part and was irrelevant. Invar said it did not agree to oust the authority of the architect. Neither had it agreed to contractually vary the completion date of the contract. Invar asserted that the architect's extension of 10½ months was wrong and that that decision should be reviewed and set aside by the arbitrator.

In the re-amended points of reply and defence to counterclaim, JDC averred that since Invar agreed to the 10½ months' extension on which JDC had acted, Invar was estopped and precluded from alleging that the 10½ months' extension, granted by the architect was wrong. In any case JDC averred that there was a binding contract between the parties on the extension of the completion date. In respect of Invar's claim for liquidated damages, JDC stated that as there was no certification by the architect as required under Clause 22 of the contract, Invar had no legal basis to make a claim for liquidated damages.

At the request of the Counsel for JDC, and agreed to by Invar, the arbitrator proceeded to hear a preliminary point - whether the circumstances of the case gave rise to a contractual variation or estoppel in equity as well as a Clause 23 extension; and if so to make an interim award on the basis of the three sums certified due by the architect. The Arbitrator heard oral evidence as well as arguments relating to the preliminary issue on 23, 24 and 26 March 1987 and gave his award on 25 April 1987. Before the award was given, Invar paid JDC a sum of $1,980,412.03 representing the difference between the total claim of $4,992,000.03 due to JDC under the three certificates of the architect and the sum of $3,012,000 claimed by Invar as liquidated damages from JDC.

In essence, the position taken by JDC was that there was a contractual variation between the parties that the completion date of the project would be extended by 10½ months. The fact that the architect also issued a certificate of extension of 10½ months under Clause 23 could not detract from the agreement of the parties. In the alternative, JDC also argued that based on equitable estoppel Invar could not resile from their commitment to a 10½ months' extension, upon which JDC had acted to its detriment. On the other hand, Invar contended that there was either a contractual variation or a Clause 23 extension; but there could not be both. Invar said there was no agreement to vary the completion date. It referred to the understanding reached at the site meeting on 16 January 1985 that JDC would revise the master-programme if the actual progress was faster, to support its stand. This was purely a case of a Clause 23 extension granted by the architect. Invar submitted that an architect's certification duties under a building contract are quasi-judicial and that an architect's certificate of extension under Clause 23 is always subject to review by an arbitrator under Clause 34.

The operative part of the award of the arbitrator, after briefly reciting in two short paragraphs the background, is as follows:

> Now I, Goh Joon Seng, having heard and duly weighed and considered the several allegations of the parties hereto and the evidence on this preliminary issue Do Hereby Make and Publish My Award of and concerning the said issue so referred to me in the manner following that is to say:
>
> (1) I find that the 10½ months' extension was awarded by the architect with the concurrence of the respondents (Invar) and accordingly the completion date was extended by mutual agreement to 28 February 1986. As completion was certified to have been achieved on 28 February 1986, the respondents (Invar) are not entitled to a set off by way of liquidated damages.
>
> (2) I therefore, award:
>
> (i) $1,860,319 being the amounts with interest at 6% per annum from date of reference to arbitration of date of payment.
>
> (ii) $3,132,092.45 taking into account the sum of $1,980,412 paid by way of interim award on 10 April 1987 with interest at 6% per annum thereon or balance thereof from 8 October 1986 to date of payment.
>
> (iii) The respondent shall pay the claimants' (JDC) costs on this preliminary issue on a party and party basis. The arbitrator's fees including the costs of the award to be borne by the respondents (Invar)

Against the above award, Invar now asks for leave of Court to appeal. It is necessary for me at this point to set out the relevant provisions of Clauses 23 and 34 of the contract:

> 23. Upon it becoming reasonably apparent that the progress of the works is delayed, the Contractor shall forthwith give written notice of the cause of the delay to the architect, and if in the opinion of the architect the completion of the works is likely to be or has been delayed beyond the Date for Completion stated in the appendix to these Conditions or beyond any extended time previously fixed under either this Clause or Clause 32(1)(c) of these Conditions,
>
> ...
>
> (e) by reason of architect's instructions issued under Clauses 1(2), 1(1) or 21(2) of these conditions;
>
> ...

then the architect shall so soon as he is able to estimate the length of the delay beyond the date or time aforesaid make in writing a fair and reasonable extension of time for completion of the Works.

Provided always that the Contractor shall use constantly his best endeavours to prevent delay and shall do all that may reasonably be required to the satisfaction of the architect to proceed with the Works

34(3) ... the Arbitrator shall, without prejudice to the generality of his powers, have power ... to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given.

I will next refer to the statutory provisions governing arbitration. The Arbitration (Amendment) Act 1980 introduced into the laws of Singapore the provisions of the English Arbitration Act 1979. This amendment abolished the previous jurisdiction of the High Court to set aside or remit an award on an arbitration agreement for errors of fact or law on the face of the award and introduced fundamental changes to the law governing judicial review of arbitral awards. The present s. 28 of our Arbitration Act (Cap 10, 1985 Edn.) is identical to s. 1 of the English 1979 Act. For the purposes of the present application before me the relevant provisions of s. 28 are:

(2) Subject to subsection (3), an appeal shall lie to the Court on any question of law arising out of an award made on an arbitration agreement; and on the determination of such an appeal the Court may by order:

(a) confirm, vary or set aside the award; or

(b) remit the award to the arbitrator or umpire for reconsideration together with the Court's opinion on the question of law which was the subject of the appeal,

and where the award is remitted under para. (b) the arbitrator or umpire shall, unless the order otherwise directs, make his award within 3 months of the date of the order.

(3) An appeal under this section may be brought by any of the parties to the reference-

(a) with the consent of the other parties to the reference; or

(b) subject to s. 30, with the leave of the Court.

(4) The Court shall not grant leave under subsection (3)(b) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and the Court may grant any leave subject to such conditions as it considers appropriate.

(5) Subject to subsection (6), if an award is made and, on an application made by any of the parties to the reference:

(a) with the consent of all the other parties to the reference; or

(b) subject to s. 30, with the leave of the Court.

it appears to the Court that the award does not or does not sufficiently set out the reasons for the award, the Court may order the arbitrator or umpire concerned to state the reasons for his award in sufficient detail to enable the Court, should an appeal be brought under this section, to consider any question of law arising out of the award.

(6) In any case where an award is made without any reason being given, the Court shall not make an order under subsection (5) unless it is satisfied:

(a) that before the award was made one of the parties to the reference gave notice to the arbitrator or umpire concerned that a reasoned award would be required; or

(b) that there is some special reason why such a notice was not given.

It is quite clear that under the above provisions, there is no automatic right of appeal against an arbitrator's award. In the first place an appeal can only lie on a question of law. Secondly, the point of law must be one which substantially affects the rights of at least one of the parties. Thirdly, unless all the other parties to the reference consent, appeal may only be made with the leave of the Court. However, the section does not lay down any criteria as to how the Court should exercise its discretion in granting leave. In so far as the instant case is concerned there is common ground between the parties that the questions of law on which Invar now seeks leave to appeal do substantially affect the rights of the parties.

It would appear that there is as yet no reported decision in Singapore on how s. 28 should be interpreted or specifically on the manner in which the Court should exercise its discretion under s. 28(3)(b) in granting leave. However, there are many English authorities on point, the most notable of which is *The Nema* [1981] 2 LLR 239 which set down general guidelines for the granting of leave to appeal. There the contract in question was a charter party and the question was whether the vessel was still obliged to proceed in accordance with the charterers' orders, or whether (as contended by the charterers) the contract had been frustrated by a prolonged strike. The arbitrator gave a reasoned award in favour of the charterers. The shipowners were given leave to appeal and it was this appeal itself which came before the House of Lords and the House held that in that case leave to appeal on a question of construction of a "one-off" Clause ought not to have been given in the first place.

Before I refer to the guidelines laid down by Lord Diplock, it may be appropriate for me to briefly touch on the philosophy or objective behind the new amendment. It seems quite clear that the UK Parliament's intention in enacting the English Arbitration Act 1979 was to promote greater finality in arbitral awards than was achieved under the previous procedure. Lord Diplock expressed his views on this aspect in *The Nema* at p. 247 as follows:

> ... it would, in my view, defeat the main purpose of the first four sections of the Act if Judges, when determining whether a case was one in which the new discretion to grant leave to appeal should be exercised in favour of an applicant against objection by any other party to the reference did not apply much stricter criteria than those stated in *The Lysland* which used to be applied in exercising the former discretion to require an arbitrator to state a special case for the opinion of the Court.

Mustill & Boyd on *Commercial Arbitration* (1982 Edn.) stated at p. 563 that "one of the most important aims of the 1979 Act was to restrict the opportunity for the losing party to postpone payment by launching an unmeritorious appeal." Counsel for Invar conceded before me that the policy of the 1979 Act was to promote London as an arbitration centre and that therefore speed and finality were very important. By adopting and incorporating those English provisions into its laws, Singapore must have intended to achieve the same aims - to promote finality in arbitration proceedings and to promote Singapore as an arbitration centre at least for this region.

Turning now to the guidelines laid down by Lord Diplock in *The Nema*, to which all the other four Law Lords agreed, this was what he said (at p. 247-248):

> Where, as in the instant case, a question of law involved is the construction of a "one-off" Clause the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the Judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the Clause by the arbitrator is obviously wrong: But if on such perusal it appears to the

Judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave; the parties should be left to accept, for better or for worse, the decision of the tribunal that they had chosen to decide the matter in the first instance. The instant case was clearly one in which there was more than one possible view as to the meaning of the "one-off" Clause as it affected the issue of divisibility...

For reasons already sufficiently discussed, rather less strict *criteria* are in my view appropriate where questions of construction of contracts in standard terms are concerned. That there should be as high a degree of legal certainty as it is practicable to obtain as to how such terms apply upon the occurrence of events of a kind that it is not unlikely may reproduce themselves in similar transactions between other parties engaged in the same trade, is a public interest that is recognised by the Act, particularly in s. 4. So, if the decision of the question of construction in the circumstances of the particular case would add significantly to the clarity and certainty of English commercial law it would be proper to give leave in a case sufficiently substantial to escape the ban imposed by the first part of s. 1(4) bearing in mind always that a super abundance of citable judicial decisions arising out of slightly different facts is calculated to hinder rather than to promote clarity in settled principles of commercial law. But leave should not be given even in such a case, unless the Judge considered that a strong *prima facie* case had been made out that the arbitrator had been wrong in his construction; and when the events to which the standard Clause fell to be applied in the particular arbitration were themselves "one-off" events, stricter criteria should be applied on the same lines as those that I have suggested as appropriate to "one-off" Clauses...

In deciding how to exercise his discretion whether to give leave to appeal under s. 1(2) what the Judge should normally ask himself in this type of arbitration, particularly where the events relied upon are "one-off" events is not whether he agrees with the decision reached by the arbitrator, but: Does it appear upon perusal of the award either that the arbitrator misdirected himself in law or that his decision was such that no reasonable arbitrator could reach. While this should, in my view; be the normal practice, there may be cases where the events relied upon as amounting to frustration are not "one-off" events affecting only the transaction between the particular parties to the arbitration, but events of a general character that affect similar transactions between many other persons engaged in the same kind of commercial activity, the closing of the Suez Canal, the United States soya bean embargo, the war between Iraq and Iran, are instances within the last two decades that spring to mind. Where such is the case it is in the interests of legal certainty that there should be some uniformity in the decisions of arbitrators as to the effect, frustrating or otherwise, of such an event upon similar transactions, in order that other traders may be sufficiently certain where they stand as to be able to close their own transactions without recourse to arbitration. In such a case, unless there were prospects of an appeal being brought by consent of all the parties as a test case under s. 1(3)(a), it might be proper exercise of the Judge's discretion to give leave to appeal in order to express a conclusion as to the frustrating effect of the event that would afford guidance binding upon the arbitrators in other arbitrations arising out of the same event, if the Judge thought that in the particular case in which leave to appeal was sought the conclusion reached by the arbitrator, although not deserving to be stigmatised as one which no reasonable person could have reached was, in the Judge's view, not right." (Emphasis added)

The Nema guidelines were re-affirmed by the House of Lords in the later case *Antaios Companies v. Salem* [1985] 1 AC 191.

The arbitrator in the instant case found that the extension on completion of 10½ months was by mutual agreement of the parties. Granted that whether on certain given facts there is a binding agreement is a conclusion of law, I am inclined to take the view that the issues that were placed before the arbitrator upon which he made a finding were more questions of fact rather than questions of law. He was asked to determine whether the parties had agreed

between them to extend the completion date by 10½ months. The arbitrator answered the question in the affirmative after examining contemporaneous documents and hearing oral evidence from the parties. If I am right in this view, then there can be no appeal to the High Court.

However, assuming that I am wrong in this view, I have still to apply the guidelines laid down in *The Nema* to determine whether leave should be given. Clauses 23 and 34 of the contract are standard Clauses. Counsel for Invar conceded that the event was a "one-off" event. As quoted above, Lord Diplock stated that even in respect of a standard Clause, "unless the Judge considered that a strong *prima facie* case had been made out that the arbitrator had been wrong in his construction" leave should not be granted. And where a standard Clause is to be applied to a "one-off" event, Lord Diplock said that "stricter criteria should be applied on the same lines as those that I have suggested as appropriate to `one-off' Clauses". That stricter criteria is, if "it is apparent to the Judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument that the meaning ascribed to the Clause by the arbitrator is obviously wrong: but if on such perusal it appears to the Judge that it is possible that arguments might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not granted leave."

On these criteria, there is nothing in the award to indicate to me that the arbitrator was obviously wrong in his decision. Indeed, can the award be considered a reasoned award? There is no scope for an appeal without reasons. This difficulty seems to have been appreciated by Invar only after having filed this motion for leave to appeal, when it further applied under s. 28(5)(b) for leave to make an application, and if leave be granted, for an order directing the arbitrator to state the reasons for his award dated 25 April 1987 in sufficient detail to enable this Court to consider the questions of law raised by Invar. This further application is also now before me. I should add that before making this further application, Invar did, by a letter dated 2 June 1987, ask the arbitrator to "write (his) reasons for the award." In reply, the arbitrator stated "the award follows my finding of fact stated in p. 2 of the award."

On the subject of reasons, the first point I have to consider is whether is this an award where no reason was given or is it a case where some reasons were given. Counsel for Invar contended that some reasons were given in the award. In the affidavit filed on behalf of JDC, the latter contended that there was really no reason given in the award and accordingly s. 28(6) applies. During the submission of Counsel for Invar before me, Counsel for JDC initially agreed that the award contained some reasons. However, following an overnight adjournment, Counsel for JDC retracted what he said and argued that this is a case, as set out in JDC's affidavit, where s. 28(6) applies.

It is common ground that none of the two parties gave notice to the arbitrator, before the award was made, that a reasoned award would be required. If this is a case where s. 28(6) applies then no leave may be granted to Invar to apply for an order for reasons to be given by the arbitrator unless the Court is satisfied that there is some special reason why such a notice was not given to the arbitrator in the first place.

In my view, it is stretching the imagination to the extreme to say that any reason was given in the present award. It seems to me that there is close similarity between the instant case and *Trave Schiffagrtsgesellschaft v. Ninemia Maritime* [1986] 2 WLR 773, where the interim award stated:

> The buyer advanced their claim on six different basis. They succeed but only on the footing that the sellers were in breach of the terms in Clause 18 of the (sale agreement) that on delivery the vessel should be free of average damages affecting class and only to the extent that on delivery there were a large number of defective tubes in each of the three areas of the starboard boiler (namely the economiser, the superheater and the generator tubes) comprising both defective tubes which had not been repaired at all at Dubai and defective tubes which had been repaired but not satisfactorily repaired...

The Court of Appeal held that the foregoing was not sufficient to take the case out of s. 1(6) of the English 1979 Act (our s. 28(6)). Sir John Donaldson M.R. said at p. 778.

> In my judgment, Parliament can never have intended that a right to be given reasons sufficient to mount an appeal should depend upon whether or not the ingenuity of Counsel can detect something which could be characterized as a reason in an award which, from the point of view of a commercial man, could never be regarded as being, or being intended to be a reasoned award... In the instant appeal the case for refusing to order reasons is overwhelming. First, I do not consider that the Judge had any jurisdiction to do so. Only by the most refined of angelic calculations could the arbitrators be considered to have given reasons for any part of their award...

Accordingly, in my judgment, the award of the arbitrator in the instant case cannot be truly called a reasoned award. It is clearly an award to which s. 28(6) applies.

The next question is whether there is "some special reason why such a notice was not given" to enable this Court to exercise its discretion of granting leave. Mr. Lim Chor Pee, Counsel for Invar before the arbitrator, in an affidavit filed on 30 June 1987 stated the following:

> Although no specific request was made to the arbitrator before the arbitration began to give a reasoned award, it was always my understanding and expectation that he would do so. This is partly because I considered it normal practice for an award in a case such as this to be with reasons and also because a verbatim shorthand note was made of the arbitration proceedings which I assumed was for the use of the arbitrator in preparing a reasoned award. Certainly had I thought for one moment that the arbitrator did not intend to give a fully reasoned award, that I would have made a specific application to him for one.

I could not help but feel that this is really an ex-post facto rationalization on the part of Mr. Lim. More likely than not, the question of asking for a reasoned award did not cross his mind. And if it did, Mr. Lim should have expressly clarified it with the arbitrator. By not raising it, was he not trying to get the best of both worlds? There should be finality to arbitration. Parties should not be allowed to wait and see how the award comes out before they decide whether or not it should be a reasoned award. The principle behind this is fairness: reasons when given are available to both sides and they can each consider whether or not they should seek leave to appeal. I cannot agree more to what Hobhouse J. said in *The Dynashinky* [1986] 1 LLR 435 "What I would regard as clearly unacceptable is that one party should try and have it both ways and wait and see - finality if he wins, an appeal if he loses."

The explanation of Mr. Lim is unlike that offered in *Warde v. Feedex International* [1984] 1 LLR 310 where the code of practice published by the Grain and Feed Trade Association provided that "full reasons for the award shall be expressed in the award form itself." Staughton J held that because of this the buyer could not be reproached where a reasoned award was nor requested on his behalf. I do not think, based on what was alleged by Mr. Lim above, that there is any special reason why a notice was not given by Invar. It follows therefore that there is no jurisdiction for me to grant leave to order the Arbitrator to give reasons.

However, assuming that I am wrong in this view and that the award given by the arbitrator is a reasoned award, though inadequate, and that s. 28(6) does not apply, this Court in considering whether leave should be granted to order the arbitrator to state further reasons for his award has to bear in mind at least the following two factors:

(i) If further reasons were ordered and given, what prospect is there that leave to appeal against the award to the High Court would be granted in accordance with the guidelines set out in *The Nema* - see *Warde & Feedex International* and *The Dynashinky* at p. 437.

(ii) No request for reasons was made by Invar to the arbitrator before the award was given- see *Warde v. Feedex International* at p. 314.

Briefly, the questions which Invar says are questions of law upon which it seeks leave to appeal to the High Court, as set out in this originating motion, are that the arbitrator erred in law in holding:

(i) the there was a binding agreement between the parties to extend time by 10½ months;

(ii) that there was consideration moving between the parties to constitute the agreement;

(iii) by implication that the extension given by the architect in the circumstances cannot be challenged or reviewed.

Though Invar admits that it is a "one-off" event, it asserts that the instant matter raises a point of law of general interest which is this: whether a contractual variation and a Clause 23 extension can stand side by side or are they mutually exclusive. In my opinion it may be inferred from the award that the arbitrator did not think that a contractual variation may not be incorporated into a Clause 23 extension. Ordinarily, a certificate issued by an architect under Clause 23 is subject to review by the arbitrator. This is so and was conceded by Counsel for JDC. But in this case there was mutual agreement to the extension, as found by the arbitrator. Of course the architect was also of the view that the 10½ months' extension was fair and reasonable and thus formally incorporated that agreement into the certificate issued under Clause 23. Counsel for Invar has failed to show that the arbitrator was obviously wrong in deciding impliedly that a contractual variation could stand alongside a Clause 23 extension. No authority has been cited to me in support of that view. I do not even think that a strong *prima facie* case has been made out that the arbitrator was wrong. In other words, Invar has not satisfied any of the two criteria set out in *The Nema*. Indeed, I would say the arbitrator is probably more right than wrong. I would have thought that the position is in many respects analogous to a consent order given by the Court following an agreement between the parties.

In any event, I do not see that a decision on those questions of law raised by Invar in this application will add significantly to the clarity and certainty of the law. Each case will have to depend on its own facts. The facts here are special. Ordinarily an owner does not involve himself in determining what is a fair extension. That is left entirely to the architect. No evidence has been presented to show that the situation that arose in this case had arisen in the past or will be likely to arise in the future. There is nothing to suggest that the event here is of the sort referred to by Lord Diplock, e.g., closure of the Suez Canal or the Iran-Iraq war. This clearly is not only a "one-off" event but also a "one-off" point and the Arbitrator's decision should be final as was intended. In the result, I do not think there is any point in ordering further reasons be given by the Arbitrator.

As I have stated at the beginning of this Judgment, Mr. Goh was selected as an arbitrator because of his knowledge and experience in this branch of the law. The two Counsels who appeared for the parties before the arbitror are also senior and experienced advocates and solicitors. And where they did not expressly request for a reasoned award, that must be taken to mean that they wished the decision of the arbitrator to be final. Mr. Wu for JDC expressly requested for an early decision. A party who wishes to preserve his right of appeal should ask for a reasoned award before the award is made.

Another factor which seems to be relevant in the consideration whether to grant leave to appeal is the identity of the applicant for leave. I can do no better than to quote what Mustill & Boyd stated at p. 563:

> One of the most important aims of the 1979 Act was to restrict the opportunity for the losing party to postpone payment by launching an unmeritorious appeal. The injustice resulting from delay bears much harder on a successful claimant than a successful respondent and it may be that the Court would take note of the fact that if a claimant is seeking leave to appeal against the dismissal of his claim, the respondent is not being kept out of his money meanwhile.

I would hasten to add that the authors, however, have also noted that this could not be a conclusive factor.

A few other points were also raised by Invar to attack the award. In my judgment nothing turns on them: I would just like to touch on two of the points. The first is that the arbitrator had failed to deal with the issue of estoppel on which both parties had made considerable submission. It seems clear to me that in the light of the decision reached by the arbitrator there was no need to deal with the question of estoppel. Alternatively, it could be said that it was impliedly convered when the arbitrator held that Invar was "not entitled to set-off by way of liquidated damages." The second point relates to the imposition of interest on the sum of $1,980,412.03 voluntarily paid by Invar to JDC on 9 April 1987. The arbitrator must have thought that he had made an interim award of $1,980,412.03 which was the amount not in dispute. The notes of the arbitration proceedings show that there was a discussion of an interim award for $1,980,412.03. It would appear that interest on that sum could only be imposed if there was an interim award for the payment of that sum. At the hearing before me Counsel for JDC expressly waived on his client's behalf, the interest element in respect of the sum of $1,980,412.03.

For all the above reasons, the application by Invar for leave to appeal under s. 28(3)(b) of the Arbitration Act is refused with costs. So also is its application under s. 28(5)(b) for leave to apply for an order directing the Arbitrator to give further reasons.

Also found at [1988] 2 CLJ 140